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IN THE

Supreme Court of the United States

OCTOBER TERM—1944.

ABRAHAM JESKOWITZ,

Petitioner,

against

LEONARD H. CARTER, Trustee in Bankruptcy of Union Fabrics, Inc.,

Respondent.

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

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Prior Proceedings and Opinions.

This case involves an order requiring petitioner to turn over to respondent, as trustee in bankruptcy, certain merchandise of the cost value of $69,921.24 or the proceeds thereof; $875, the proceeds of a diamond ring converted by the petitioner; and certain books and records (R. 17-28A).

Upon a petition to review, the turnover order was confirmed by the District Court *sub nomine In re Union Fabrics, Inc.*, 50 F. Supp. 145. It was then affirmed by the Circuit Court of Appeals for the Second Circuit, *sub nomine Cohen v. Jeskowitz*, 144 F. (2d) 39.

On December 11, 1944, this Court denied petitioner's petition for a writ of certiorari to review the turnover order.

(*Cf.* No. 658, October, 1944 Term, ***sub nomine Jeskowitz*** v. *Carter.*)* On January 2, 1945, this Court denied petitioner's application for a rehearing (*id.*).

On February 9, 1945, the Circuit Court of Appeals made an order denying petitioner's motion for leave to reopen the turnover proceedings and to take additional testimony therein (R. 16, 47). In form, the instant—petitioner's second—petition for a writ of certiorari purports to relate to that order denying leave to reopen the case. In substance, it is a rehash of petitioner's prior petition for a writ of certiorari to review the turnover order itself.

Statement of the Case.

Respondent controverts as erroneous petitioner's "Statement of Facts". Respondent respectfully refers to the opinion of the Circuit Court of Appeals for an accurate and complete statement of the case (*Cohen* v. *Jeskowitz*, 144 F. (2d) 39; R. 29-33; *cf.* also R. 17-28A). Inasmuch as that opinion is already before this Court in the record, it will serve no useful purpose here to repeat the statement of the case there set forth and hereby adopted.

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* On February 5, 1945, this Court also denied certiorari in *Maggio* v. *Zeitz* (No. 793), which purported to raise the same questions as those in the petition for certiorari denied in this case (No. 658).

Argument.

I. The constitutional question purported to be raised by petitioner is without substance.

II. The denial of petitioner's motion to reopen the turnover proceedings was an exercise of sound discretion which this Court will not review.

III. The papers comprising the record made before the Circuit Court of Appeals involve questions of fact and credibility which will not move this Court to grant a certiorari.

POINT I.

The constitutional question purported to be raised by petitioner is without substance.

The greater part of petitioner's instant petition for a writ of certiorari (pp. 2-10) is a reprint verbatim or condensation of petitioner's prior petition for a writ of certiorari (pp. 2-21) and of his petition for rehearing thereon (pp. 1-10). This sufficiently appears from comparison of those pages of the instant petition for certiorari with those pages of the prior petitions for certiorari and rehearing.

No useful purpose would be served by discussing those parts of the instant petition which duplicate the first and second petitions which this Court has already denied in this very case (No. 658). With this elimination, the only part of the instant petition containing any new matter is pages 11-14 thereof, where the *sole* reason assigned by petitioner for the writ now requested is presented and argued.

The sole reason thus assigned is that petitioner was allegedly deprived of "due process of law" provided for

in the Fifth Amendment to the Constitution of the United States, in that the evidentiary presumption provided in §21-L of the Bankruptcy Act was applied in this case without notice to petitioner of intention to do so.

Section 21-L of the Bankruptcy Act provides:

> "In any proceeding under this Act against a bankrupt for an accounting by him for his property or the disposition thereof, or to compel a turn-over of property by him, if his books, records, and accounts shall fail to disclose the cost to him of such property sold by him during any period under consideration, it shall be presumed, until the contrary shall appear, that such property was sold at a price not less than the cost thereof to him."

The inventory sheets and records that would disclose the cost of merchandise sold were missing (R. 30). Petitioner's testimony concerning such cost was found by the trier of the facts to be "wholly unworthy of belief" (R. 31). Accordingly, the above quoted presumption of §21-L was applied (R. 30-31). Section 21-L contains no requirement that the evidentiary presumption therein provided may not be invoked without prior notice.

That such an evidentiary presumption does not offend the due process clause of the Fifth or Fourteenth Amendments to the Constitution is elementary. In *Mobile J. & K. C. R. Co.* v. *Turnipseed*, 219 U. S. 35, this Court held (p. 42):

> "Legislation providing that proof of one fact shall constitute *prima facie* evidence of the main fact in issue is *but to enact a rule of evidence,** and quite within the general power of government. *Statutes, national and state, dealing with such methods of proof in both civil and criminal cases, abound, and*

* Italics in this and all subsequent quotations are ours, unless otherwise indicated.

the decisions upholding them are numerous." (Citing cases.)

The due process clause of the Fifth Amendment, in relation to deprivation of liberty, requires reasonable notice and opportunity to be heard. Petitioner does not claim that he was not given reasonable notice of the turnover proceedings. He was heard therein before the Referee in Bankruptcy at nineteen hearings beginning on January 27, 1941 and ending May 6, 1942 (R. 17). He was also heard before the District Court, the Circuit Court of Appeals, and this Court, and several times in each of them, upon appeals which he himself initiated, covering a period from May 6, 1943 to January 2, 1945, when his last petition for rehearing in this Court was denied. It is clear that his instant and second petition for certiorari is merely another device to procure a delay of execution of judgment.

POINT II.

The denial of petitioner's motion to reopen the turnover proceedings was an exercise of sound discretion which this Court will not review.

The petition to reopen the turnover proceedings was in essence an application for rehearing or for the granting of a bill of review. In *Roemer* v. *Neumann*, 132 U. S. 103, this Court held (p. 106):

"* * * The granting or refusal, absolute or conditional, of a rehearing in equity, as of a new trial at law, rests *in the discretion of the Court in which the case has been heard or tried, and is not a subject of appeal.*"

In *Boesch* v. *Graff*, 133 U. S. 697, this Court held (p. 699):

> "* * * These propositions are presented by the errors assigned, and are the only errors alleged which require attention, that which questions the infringement not being argued by counsel, *and that which goes upon the refusal of the Circuit Court to grant a rehearing not being open to consideration here.*" (Citing cases.)

Moreover, the petition to reopen the turnover proceedings is not timely. The turnover order was made on February 23, 1943 (R. 17). It was confirmed by the District Court on May 6, 1943. It was affirmed by the Circuit Court of Appeals on July 21, 1944, during the October, 1943 Term of that Court. More than two years have elapsed since the turnover order was made, and much more than six months have elapsed since the expiration of the Terms of the District Court and of the Circuit Court of Appeals in which the turnover was made, confirmed and affirmed.

Fraud in procuring the turnover order is neither alleged nor proved. Therefore, whether measured by the expiration of the Terms of the Courts referred to above, or by the period of "six months after such judgment, order, or proceeding was taken", as provided in §60(b) of the Federal Rules of Civil Procedure, petitioner's application for relief from the turnover order in the form of reopening of the turnover proceedings is not timely.

Hazel-Atlas Glass Company v. *Hartford-Empire Company*, 322 U. S. 238, 244, 255-256.

POINT III.

The papers comprising the record made before the Circuit Court of Appeals involve questions of fact and credibility which will not move this Court to grant a certiorari.

The only question presented by petitioner, *in his petition for certiorari*, as a reason for granting the writ is the fictive constitutional point discussed at pages 3-5, *supra*. "Only the question *specifically* brought forward by the *petition* for a writ of certiorari will be considered" (United States Supreme Court, General Rules, Rule XXXVIII, 2).

The papers in the record as made before the Circuit Court of Appeals do not purport to raise that single constitutional question brought forward by the petition for certiorari in this Court. Those papers involve questions of fact and credibility, common to controversies concerning missing inventories of bankrupts (R. 17-28A, 33-36).

This Court should not be moved to grant a writ of certiorari which will involve no more than review of papers presenting commonplace questions of fact and credibility, especially after this Court has already denied certiorari and rehearing in the very same case.

In *General Talking Pictures Corp.* v. *Western Electric Co.*, 304 U. S. 175, this Court stated (p. 178):

> "Granting of the writ would not be warranted merely to review the evidence or inferences drawn from it."

In *United States* v. *Johnston*, 268 U. S. 220, this Court stated (p. 227):

> "We do not grant a certiorari to review evidence and discuss specific facts."

Conclusion.

The petition for a writ of certiorari should be denied.

Dated, New York, N. Y.
April 27, 1945.

Respectfully submitted,

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